



U.S. COMMODITY FUTURES TRADING COMMISSION

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PATRICIA BRAGG,

Complainant,

v.

WALTER FRANK PRICE, RB&H
FINANCIAL SERVICES LP,
TRADELIN BROKERAGE SERVICES
LLC d/b/a AMERIVEST BROKERAGE
SERVICES,

Respondents.

CFTC Docket No. 97-R109

ORDER OF DISMISSAL

Overview

Because of complainant Patricia Bragg's willful defiance of the Court in refusing to provide discovery -- and the prejudice resulting to respondents Walter Frank Price, Tradeline Brokerage Services LLC, and RB&H Financial Services LP from Bragg's refusal -- respondents' motion to dismiss the Complaint is GRANTED, and this proceeding is terminated in its entirety.

Procedural Background

Bragg's Conduct at the Complaint Forwarding Stage

On July 14, 1997, Patricia Bragg ("Bragg"), appearing pro se, filed a reparations complaint seeking to recover \$34,772.20 in trading losses incurred in two commodities accounts introduced by Tradeline Brokerage Services LLC ("Tradeline"), brokered by Walter Frank Price ("Price"), and cleared by RB&H Financial Services LP ("RB&H").¹ In a one-page letter, Bragg generally alleges that Price, an associated person for Tradeline, overstated the profit potential and understated the risks associated with trading commodity futures and options contracts before and during the existence of the accounts.²

On July 23, 1997, the Director of the Office of Proceedings sent a letter to Bragg to alert her of deficiencies in her complaint.³ In the July 23 letter, the Director informed Bragg

¹ Commodity Futures Trading Commission Reparations Complaint ("Complaint"), filed July 14, 1997. In the Complaint, Bragg actually seeks recovery of \$35,000, an amount equal to the total of all of her account deposits. Id. Her computation of losses, however, overlooks the fact that she received a refund of the then current balance, \$227.80, on closing her last account. Id.; RB&H Monthly Account Statement for the Period Ending January 31, 1997.

² Complaint.

³ These deficiencies included the Complaint's failure: to clearly identify Walter Frank Price as a respondent, to attach account statements and other documentation in support of Bragg's claims, to make a proper election of procedures to be employed to resolve the Complaint, and to provide the required verification. Letter from R. Britt Lenz, Director of the Office of Proceedings, to Patricia Bragg ("Lenz Letter"), dated July 23, 1997. See also Note to File Regarding Deficiencies Relating to CFTC Docket No. 97-R109, undated.

that she must cure these deficiencies on or before August 5, 1997.⁴ This deadline, however, came and went with no word from Bragg.

From August 8 through August 18, the Office of Proceedings ("Proceedings") staff attempted three times to contact Bragg to ascertain the whereabouts of her overdue submission.⁵ On August 18, an unidentified person informed the Proceedings staff that complainant was "unavailable."⁶ Later that day, however, Proceedings received a telephone call from an individual who identified himself as David Cox ("Cox"), Bragg's "assistant."⁷ Purporting to speak on Bragg's behalf, Cox indicated that he recalled seeing the deficiency letter, but could not find it.⁸ Cox requested that the Proceedings staff telefax a copy of the deficiency letter to him and e-mail a copy to Bragg.⁹ Cox

⁴ Lenz Letter.

⁵ See Second Note to File, CFTC Docket No. 97-R109, undated.

⁶ Id.

⁷ Id. Cox has been variously identified as Bragg's "business controller," "bookkeeper" and "accountant." Complaint; Transcript of October 28, 1997 Telephonic Prehearing Conference ("Tr.") at 13. As a non-attorney, Cox was and is precluded from representing Bragg in this matter. See 17 C.F.R. §12.9; Notice, dated January 8, 1998.

⁸ Id. The record does not indicate whether Cox sought to explain why Bragg failed to personally respond to the Proceedings telephone call, or whether Bragg herself was in possession of, or had seen, the deficiency letter.

⁹ Id.; Facsimile from the Office of Proceedings to David Cox, dated August 19, 1997.

represented that Bragg would respond to the letter by August 20.¹⁰

By priority mail post-marked August 20, Bragg cured the deficiencies that concerned Proceedings.¹¹ Finally, after numerous attempts by Proceedings staff to contact Bragg, the Complaint was ready to be forwarded and served on respondents.

Bragg's Conduct at the Discovery Stage

On October 14, 1997, respondents, also appearing pro se, jointly filed a two-page answer in which they denied any wrongdoing.¹² Respondents countered Bragg's general allegations with those of their own. According to respondents, Bragg was "an experienced business owner and knowledgeable investor" who "knew the risks involved in speculating" in commodity futures and options contracts, and that she "directed and approved" the trades executed in the accounts.¹³

On October 16, 1997, the Proceedings Clerk issued a Notice and Order to all parties which indicated that the case had been

¹⁰ Second Note to File.

¹¹ Letter from Patricia Bragg to the Office of Proceedings with attachments, dated August 19, 1997. The letter was not received by Proceedings until August 26. In the meantime, on August 22, Proceedings staff again attempted to contact Bragg, with no luck. Instead, an unidentified person informed staff that Bragg was "out of the country and would not return for one month." Third Note to File, CFTC Docket No. 97-R109, undated. Proceedings staff was also unsuccessful in an attempt to contact Cox on August 25. Id.

¹² Answer to Complaint ("Answer"), dated October 8, 1997.

¹³ Id. at ¶¶5 and 7.

assigned to the undersigned Administrative Law Judge.¹⁴ In the Notice and Order, the parties were notified that all discovery requests must be served within thirty days, or by November 17, 1997, and that discovery was to be completed within fifty days, or by December 7, 1997.¹⁵ The Notice and Order was served on all parties by United States Postal Service certified mail, and was signed for at Bragg's address of record. Bragg has never suggested that she failed to receive the Notice and Order, or somehow misplaced or overlooked it.

On November 14, 1997, respondents served discovery requests pursuant to Commission Rules 12.30 through 12.36, 17 C.F.R. §§12.30-12.36.¹⁶ They propounded ten interrogatories, eight

¹⁴ Notice and Order, dated October 16, 1997.

¹⁵ Id.; 17 C.F.R. §§12.5(a), 12.30(d), 12.31(a), 12.32(c)(2), and 12.33(b). The Notice and Order also specifically directed the parties' attention to the applicable Commission rules regarding the substance and timing of discovery. Notice and Order at 1 n.1. In addition, the Proceedings Clerk alerted the parties to the rules' service requirements and attached a Service List containing each party's address and telephone number of record. In addition, the Notice and Order cautioned all parties to keep their addresses and daytime telephone numbers current with both the Court and each other, otherwise "unnecessary delay and disruption [results], which may result in sanctions including dismissal or default against the non-complying party." Id. at 2.

¹⁶ Respondents' First Request for Production of Documents Directed to Complainant Patricia Bragg ("Request for Documents"), dated November 14, 1997; Respondents' First Request for Admissions Directed to Complainant Patricia Bragg ("Request for Admissions"), dated November 14, 1997; Respondents' First Set of Interrogatories Directed to Complainant Patricia Bragg ("Deposition on Interrogatories"), dated November 14, 1997.

Prior to the filing of respondents' discovery requests, Bragg filed a two-page reply to respondents' answer in which she reaffirmed the allegations in the Complaint. Point by Point Response to the Answer to the Complaint ("Response"), dated October 21, 1997. The Court also conducted an October 28, 1997
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requests for admissions, and nine requests for the production of documents.

Bragg's responses were due on December 10, 1997. Faced with another production obligation in this forum, she responded as she did to Proceeding's earlier deficiency letter -- she did nothing.

On December 29, 1997, respondents filed a motion to compel discovery,¹⁷ which the Court granted.¹⁸ The Court ordered Bragg to comply with respondents' discovery requests on or before January 21, 1998, and cautioned her that her failure to comply with the Court's Order could result in sanctions, including dismissal of the Complaint.¹⁹

Bragg did not comply with the Court's Order compelling discovery production. Instead, like "Back to the Future," Cox re-emerged. On January 7, 1998, the Court received a letter from Cox, via telefacsimile, again purporting to speak on Bragg's behalf.²⁰ In his letter, Cox professes that Bragg is again "out of the country," but available to him by telephone. According to

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teleconference, at which Bragg discussed the facts underlying her reparations claim with respondents and the Court. See Notice of Prehearing Conference, dated October 20, 1997.

¹⁷ Respondents' Motion to Compel Responses to Discovery Requests Propounded on Complainant, dated December 26, 1997. The motion was filed by telefacsimile. A mailed copy was received on December 30, 1998.

¹⁸ Order Compelling Production of Discovery, dated December 31, 1997.

¹⁹ Id.

²⁰ Letter from David Cox to the Court, dated January 7, 1998.

Cox, Bragg "has never seen," nor is Cox "[]able to locate" a copy of respondents' discovery requests.²¹ He requests another copy, quarrels with the requests' anticipated demands, and concludes by requesting an additional two month delay for Bragg's responses.²²

²¹ Id.

²² Id. The letter reads as follows:

"On behalf of Patricia Bragg, I am in receipt of your Order Compelling Production of Discovery that was delivered to Dr. Bragg's offices on 1/05/98. Unfortunately, Dr. Bragg is out of the country lecturing in New Zealand and Australia until March 3, 1998.

I did have the opportunity to speak with Patricia Bragg via the phone and reviewed the document with her. Dr. Bragg's response was that she has never seen the respondents discovery requests filed on November 14, 199[7]. I was also unable to locate a copy of the discovery request at her offices. Dr. Bragg also stated that if the respondents discovery requests are similar to those pursued with Ali McDaniel (CTF 97-R057) that you ruled against the respondents need for such information.

On behalf of Patricia Bragg, I respectfully request a copy of the respondents discovery requests dated November 14, 1997. I also request a delay in the order compelling production until March 23, 1998 so that Dr. Bragg will have sufficient time upon her return to the country to file a response.

Sincerely,

/s/ David Cox "

Bragg's recollection from overseas of the McDaniel reparations case is impressive, if not entirely accurate. The reference to "CTF 97-R057" refers to CFTC Docket No. 97-R057. In that proceeding, Alison McDaniel, as co-trustee of a family trust, seeks to recover trading losses on behalf of the trust from the same respondents named in this case, stemming from investment strategies extremely similar to those made by Bragg. In preparation for hearing, respondents in the McDaniel matter
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On January 8, the Court issued a Notice to all parties that Cox's letter was a prohibited ex parte communication, that the Court would disregard it, and that Bragg's response remained due by January 21, 1998.²³ In the Notice, the Court also cautioned Bragg a second time that her noncompliance might result in sanctions, including dismissal of the Complaint.²⁴

When January 21 arrived, Bragg had not complied. Instead, the Court received another letter, this time purporting to be from Bragg herself.²⁵ In a letter strikingly similar to Cox's ex

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filed a deposition on interrogatories and requests for production. The Commission's other Administrative Law Judge denied most of respondents' interrogatories because the requests sought to evaluate McDaniel's "economic and intellectual suitability" for investing in commodities -- information wholly irrelevant to the issue of fraud. Rulings on Motions to Compel, CFTC Docket No. 97-R057, dated September 4, 1997. The Administrative Law Judge also denied the requests for production because they sought to obtain documents associated with the family trust that were "irrelevant to the issues in [the] case." Id.

Respondents' discovery requests in this proceeding, however, seek information and documents that are plainly material to evaluating Bragg's veracity concerning: (1) the representations made to her by respondents; (2) her understanding of the risk associated with trading of commodity futures and options; and (3) the extent to which persons other than Price recommended the trading in her accounts.

²³ Notice, dated January 8, 1998. The Court attached Cox's January 7 Letter to the Notice. Not only had Cox not certified the service of his letter to all parties, Cox was not authorized to represent Bragg in this proceeding. See 17 C.F.R. §§12.9 and 12.10(a).

²⁴ Notice at 2.

²⁵ Letter from Patricia Bragg to the Court, dated January 15, 1998. Although dated January 15, 1998, the letter was mailed via overnight delivery on January 20, and received by the Office of Proceedings on January 21.

parte request, Bragg claims to have never seen the discovery requests, asks for another copy, engages in anticipatory quarrels with respondents' "discovery tactics" and seeks a two month delay in production.²⁶

This time respondents objected. On January 23, 1998, respondents moved the Court to dismiss the Complaint on the ground that Bragg had failed to comply with the Court's Order compelling discovery production.²⁷ In the joint motion to

²⁶ Id. The letter reads as follows:

"I have been notified of your Order Compelling Production of Discover [sic]. Unfortunately, I will be out of the country lecturing in New Zealand and Australia until March 3, 1998.

I have not seen respondents discovery requests and am unable to locate a copy of the documents at my office. I'm led to believe the respondents have used similar discovery tactics with Ali McDaniel (CTF R-057) that you deemed unnecessary.

I respectfully request a copy of respondents discovery requests dated November 14, 1997. I also request a delay in the order compelling production until March 23, 1998 so that I will have sufficient time to file a response upon my return to the country.

The information provided is true to the best of my knowledge

Dated this 15th day of January, 1998

/s/ Patricia Bragg"

If in fact Bragg was out of the country, and if in fact the signature on the letter is indeed Bragg's, the Court is puzzled as to why the document was mailed from California. See FedEx USA Airbill, dated January 20, 1998.

²⁷ Motion Requesting Dismissal, dated January 23, 1998.

dismiss, respondents attached the certified mail receipt as proof that Bragg received the discovery requests at her address of record on November 17, 1997.²⁸

On January 27, 1998, the Court bent over backwards. Mindful of Bragg's pro se status, it overlooked Bragg's delinquency and extended the deadline for her discovery production until February 21, 1998.²⁹ However, after two previous warnings, it was unequivocal in issuing a third: no further extensions would be granted, and "[c]omplainant's failure to comply with this Order, or any subsequent prehearing obligation, shall result in sanctions."³⁰ Moreover, the Court expressly deferred consideration of respondents' motion to dismiss.³¹

This final warning had little effect. On February 13, 1998, one business day before the February 17 deadline, the Court received another letter, again purporting to be from Bragg.³² While conceding that "respondents did send a copy of their discovery request to my office," she professed that these

²⁸ See United States Postal Service Receipt for Certified Mail, attached to Motion Requesting Dismissal.

²⁹ Order Extending Discovery Deadline, dated January 27, 1998.

³⁰ Id. at 2-3 (emphasis added, note omitted).

³¹ Id. at 2.

³² Letter from Patricia Bragg to the Court, dated February 10, 1998. Although the letter represents that Bragg remains out of the country, Bragg's signature appears on a document dated one day and sent from California to Washington, D.C. on the next day. Id.; United States Postal Service Express Mail, Addressee Copy, dated February 11, 1998.

documents had been lost and that she had never seen them.³³ She renewed her request that the Court send her a copy, and that she be provided until March 23, 1998 to make the compelled production.

On February 17, 1998, the Court issued an Order denying Bragg's request for an extension of time.³⁴ Accordingly, Bragg failed to comply with the Court's discovery orders. She has never produced the compelled discovery and has not been heard from since.

The Court now considers respondents' motion requesting dismissal of the Complaint.

Discussion

—When is Dismissal an Appropriate Sanction for Discovery Violations?

The purposes of discovery sanctions are threefold: (1) to punish those whose conduct is sufficiently flagrant, (2) to serve as a general deterrent, and (3) to protect the diligent party.³⁵ Although the Commission has expressed that "generally a decision on the merits based on full participation of all parties is the

³³ Id.

³⁴ Order Denying Complainant's Motion for Extension of Time, dated February 17, 1998.

³⁵ Dick v. Chicago Commodities, Inc., [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶22,934 at 31,741 (CFTC Feb. 3, 1986) (citing National Hockey League v. Metropolitan Hockey Club, 427 U.S. 639, 643 (1976)).

preferred outcome of a reparation proceeding,"³⁶ dismissal is an appropriate sanction for discovery violations when it is "just" under the circumstances. Ordinarily, the circumstances warranting dismissal involve "willfulness, bad faith or fault" of the noncomplying party.³⁷ Further, the decision to dismiss a party's complaint cannot be "just" when the imposition of an alternative (and more focused) sanction would be sufficient.³⁸

³⁶ Levine v. Stotler & Co., [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶25,164 at 38,425 (CFTC Nov. 6, 1991) (citing Matthews v Paine Webber Jackson Curtis, Inc., [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶23,946 (CFTC Sept. 22, 1987)).

³⁷ Dick, ¶22,934 at 31,738 (citing National Hockey League, 427 U.S. at 640); see Gross v. Verrilli Altschuler Schwartz, Inc., [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶23,130 at 32,340 (CFTC July 8, 1986). Bad faith is "[t]he opposite of 'good faith,' generally implying or involving actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfill some duty or some contractual obligation, not prompted by an honest mistake as to one's rights or duties, but by some interested or sinister motive." Black's Law Dictionary (Fifth Ed. 1979) 126.

The Commission has given content to its requirements by reference to analogous standards set forth in the Federal Rules of Civil Procedure. Oram v. National Monetary Fund, [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶23,670 (CFTC May 28, 1987). Misconduct by a party can be grounds for dismissal or a default judgment in actions brought under the Federal Rules. See Morgan v. Massachusetts General Hosp., 901 F.2d 186 (1st Cir. 1990) (appellant who willfully violated procedural rules and explicit orders of the district court was not entitled to have his case heard on the merits); Davis v. Fendler, 650 F.2d 1154, 1161 (9th Cir. 1981) ("The sanction was imposed because of appellant's persistent unresponsiveness to both informal discovery requests and formal court orders. Appellant never appeared to take seriously the district judge's orders."); Emerick v. Fenick Industries, Inc., 539 F.2d 1379 (5th Cir. 1976) (dismissal is not an abuse of discretion when a party demonstrates the other's flagrant disregard for the court and the discovery process).

³⁸ Radden v. Futures Trading Group, Inc., [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶26,281 at 42,425 (CFTC Dec. 12, 1994).

Thus, the Court is "required to consider the full record in determining whether to dismiss for failure to comply with discovery orders."³⁹

By the Court's repeated warnings and by respondents' unanswered motion to dismiss, Bragg has had ongoing notice that her persistent noncompliance put her complaint in jeopardy. She has engaged in dilatory and evasive tactics that have undermined the discovery process, and disrupted the fair and orderly conduct of this proceeding. As such, Bragg's bad faith conduct plainly mandates the imposition of some sanction.

To determine what sanction is appropriate, however, the Court now assesses Bragg's misconduct and its procedural and evidentiary implications in light of the record before it. This requires the Court to consider Bragg's discovery violations in the context of the nature and circumstances of the parties' dispute. This examination leads the Court to conclude that justice in this matter can only be served by dismissal of the Complaint.

³⁹ National Hockey League, 427 U.S. at 641-42; see Jenne v. PaineWebber, Inc., [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶24,329 at 35,425 (CFTC Aug. 31, 1988) ("Dismissal without any analysis of the evidence in the record...is essentially punitive and completely out of proportion to the conduct at issue.").

Bragg's Trading

On a Friend's Recommendation, Bragg Opens an Account with Price

At an unspecified time in April 1996, Alison McDaniel recommended that her friend, Patricia Bragg, open a commodities trading account with Price at Tradeline.⁴⁰ In opening her account, Bragg completed and signed several documents, including: (1) a customer application, (2) a customer account agreement with RB&H,⁴¹ and (3) a customer acknowledgment of receipt of the six

⁴⁰ Complaint ("I was referred to Walter Price by my personal friend, Alison McDaniel"); Tr. at 5 ("Well, in April of last year, a friend of mine told me about Walter Price and how wonderful he was and that it was -- she had been successful with it and that I should invest my money with him.").

There is no allegation that Price solicited Bragg to become his customer.

⁴¹ Paragraph 34 of the customer account agreement states the following:

"NO GUARANTEES. Customer acknowledges that he has no separate agreement with his broker or any RB&H employee or agent regarding the trading in his commodity account, including any agreement to guarantee profits or limit losses in his account. Customer understands that he is under an obligation to notify RB&H's Compliance Manager immediately in writing as to any agreement of this type. Further, Customer understands that any representation made by anyone concerning his account which differs from any statements he receives from RB&H must be brought to the attention of RB&H's Compliance Manager immediately in writing."

See Answer, Exhibit A. Complainant dated and signed each page of the customer account agreement. It appears that Bragg never notified RB&H's Compliance Manager, orally or in writing, of any statements made by respondents in violation of the above paragraph. Tr. at 23-24.

page risk disclosure statement for futures and options.⁴² On April 23, 1996, Bragg deposited \$10,000 into her non-discretionary account ("Grain Account").⁴³

The Grain Account

The RB&H account statements indicate that Bragg initially invested in oat futures.⁴⁴ After two roundturn trades, the Grain Account had realized a small profit. Beginning May 2, 1996, Bragg established long futures positions in wheat and oats, and created a long spread position in wheat options,⁴⁵ i.e., bought Sep96 wheat call options and sold Mar97 wheat call options. However, a significant decline in the price of oats over the next few weeks triggered substantial unrealized losses in her futures position. To properly margin her worsening

⁴² See Answer at ¶4 and Exhibits A and B; Response at ¶4 ("The claimant [sic] acknowledges the receipt of the risk disclosure.").

⁴³ Complaint; Answer at ¶2 and Exhibit A; Tr. at 6; RB&H Monthly Account Statement for the Period Ending April 30, 1996. The record indicates that Bragg did not sign the limited power of attorney necessary to authorize any other person to control the trading in her account. Answer, Exhibit A.

⁴⁴ On the opening of her account, Bragg also engaged in a roundturn trade of four gold futures contracts. Having realized a profit of approximately \$140, Bragg does not complain of this transaction. The record contains no indication as to who instigated the trade.

⁴⁵ In an intra-market spread position, the investor purchases a futures or option contract in a commodity for one delivery month, and sells the same type of contract for the same commodity in a different month. Investors engage in intra-market spread trading to take advantage of perceived price inefficiencies between delivery months. CFTC Glossary 38.

position, Bragg deposited \$10,000 on May 17, followed by another \$10,000 on May 24, 1996.⁴⁶ During June 1996, the losing futures positions were offset for an approximate loss of \$18,000. In addition, Bragg liquidated her losing options spread for an approximate loss of \$1,500, and transferred the balance of \$12,170.40 into a new account.

The Dollar Index Account

According to the RB&H account statements, Bragg opened a second account on June 7, 1996 with a \$5,000 deposit. Combining her \$5,000 deposit with transfers from the Grain Account, Bragg invested \$17,170.40 into this new account ("Dollar Index Account").

From June 1996 through January 1997, the Dollar Index Account was traded based upon the Delta Neutral Option Strategy.⁴⁷ Over the course of six months, Bragg wrote put and

⁴⁶ On May 2 and May 14, 1996, Bragg purchased 25 Jul96 oats futures contracts at the price of 2.62 and 2.57, respectively. Chicago Board of Trade records (available on the World Wide Web at www.cbtc.com) indicate that the price of Jul96 oats declined from 2.44 on May 17, to 2.354 on May 21, to 2.174 on May 31. As of May 31, complainant's long position in Jul96 oats had declined to a negative equity position of approximately \$21,000. These May deposits thus restored Bragg's cash commitment to a level in excess of her leveraged liability.

⁴⁷ As Price explained it, an investor following the Delta Neutral Option Strategy anticipates that the market will not significantly fluctuate in either direction. As a result, the investor will write call and put options with various strike prices that straddle the current market price. If the market remains stable as anticipated, then the investor retains the premiums for the options (which eventually expire worthless). However, should the market break out of the anticipated price range, the investor is forced to offset his bounded position at prices causing a loss. Tr. at 29.

call options linked to the US Dollar Index. Although a few of the positions initially realized small profits, the price of the September and December US Dollar Index futures contracts eventually moved against Bragg's positions, causing her to suffer significant losses. At the end of January 1997, Bragg closed her account and RB&H refunded the remaining \$227.80.

In sum, Bragg opened a commodities account at the behest of her friend. She signed all the necessary documents to open the account, and subsequently deposited a total of \$35,000 into two non-discretionary accounts, which traded from April 1996 until January 1997. In one account, she traded primarily grain futures and options contracts; in the other, options on the US Dollar Index. And although the balance in each account gradually deteriorated due to adverse market conditions, Bragg continued to execute trades in each of those ten months, apparently without filing one protest with Price, Tradeline, or RB&H.

Bragg's Allegations

On what basis does Bragg seek reparations for her trading losses? In her pleadings, Bragg alleges that respondents fraudulently induced her to execute trades in grains and US currency derivatives by improperly explaining the associated risks, and that they effectuated unauthorized trades in her accounts.⁴⁸ More specifically, Bragg alleges that when she

⁴⁸ See Complaint; Response.

In short, without specifically referencing the Commodity Exchange Act ("Act"), Bragg has pled violations of the antifraud (continued..)

approached Price concerning the opening of the Grain Account, he assured her that the investment would be "foolproof" and subject to "stop gap measures."⁴⁹ Further, when the Grain Account went south, respondents allegedly induced her to continue trading by "misrepresent[ing] the risk involved with their investment in the currency market."⁵⁰

Respondents tell a different story. They insist that Bragg understood and approved of the trades executed in her two

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provisions of: Section 4b(a) of the Act, 7 U.S.C. §6b(a)(iii) (futures); and Section 4c(b) of the Act, 7 U.S.C. §6c(b) (options), and Commission Regulation 33.10, 17 C.F.R. §33.10 (options). See Section 14(a)(1)(A) of the Act, 7 U.S.C. §18(a)(1)(A) ("Any person complaining of any violation of any provision of the Act or any rule, regulation, or order issued pursuant to this Act by any person who is registered under this Act may, at any time within two years after the cause of action accrues, apply to the Commission for an order awarding-- (A) actual damages proximately caused by such violation.").

⁴⁹ Tr. at 5; see Response at ¶5.

⁵⁰ Response at ¶7.

"Within two weeks, Walter Price told me that wheat futures were a potential disaster and I had already lost a good portion of my initial investment. He told me not to be concerned and that he had a solid investment strategy in the dollar currency market and he could make up my losses by the end of the year. All he needed was a little time and another \$10,000. Walter Price called me and my business controller, David Cox, several times over the next week attempting to explain his expertise in the currency market. He stated that with his experience it would not be a high risk investment and return would be excellent. He did need another \$10,000 to make it work."

Complaint.

accounts, and was fully aware of the risks inherent in futures and options speculation.⁵¹ More specifically, respondents allege that Bragg prided herself on her expert knowledge of grain markets and actively directed the portfolio of the Grain Account.⁵² And although Price admits that he recommended the

⁵¹ Answer at ¶6.

⁵² Price stated:

"[Bragg] was very eager, very enthusiastic about grain prices going much higher. She was in the health food business. She knew sources that had told her that grain prices were going to the sky and that she wanted to take advantage of it in a big way. We positioned [Bragg] in grains, looking for higher prices. Those truly and clearly were her trades."

Tr. at 22.

Robert Gorrie, President of RB&H, stated:

"[Bragg] indicated to the broker that she was well-connected in the health food industry and almost that she knew something he didn't with respect to future grain prices, and she frankly, was a name dropper."

She told the broker that she had information from Dick Gregory, a celebrity, and that she was confident that grains would be going higher, and she traded almost identically to her friend, the one who referred her to us for a couple of months trading grains."

Tr. at 18.

Bragg denies all of this.

"I'd like to say that I have no friends in the grain business. I never said that I was a pro in the grain business or I had inside - - insider information. That's not true at all and I was never adamant about grains at all."

(continued..)

Delta Neural Option Writing Strategy to Bragg as a means by which she might try to recoup her losses,⁵³ he contends that she was fully apprised of the risks.⁵⁴

**In this Case, Dismissal of the Complaint
is the Only Fair and Reasonable Remedy**

Five months have passed since respondents served their discovery requests, and nearly four months have passed since they filed their motion to compel discovery and the Court granted the motion. Bragg has had no less than four separate warnings concerning the possible consequences of her failure to comply with her discovery obligations: the first given by the Proceeding Clerk,⁵⁵ followed by three more warnings from this Court.⁵⁶

(..continued)

Tr. at 26.

⁵³ Tr. at 28 ("I had been [writing] some of those [dollar index options] with other clients.").

⁵⁴ Tr. at 29-31.

⁵⁵ Notice and Order, dated October 16, 1997.

⁵⁶ Order Compelling Production of Discovery, dated December 31, 1997; Notice, dated January 8, 1998; Order Extending Discovery Deadline, dated January 27, 1998.

At best, Bragg appears to insist that the Court's prehearing schedule be controlled by her purported extensive personal commitments and controlled by a pace only known to her. See Tr. at 11 ("I travel. In fact, I've been gone six months of the year already. I was gone a great deal of last year."); Tr. at 27 ("I'm away a great deal of the time. I've been away this year already five months....").

The list of Bragg's misconduct in this proceeding starts with her failure to notify the Court and respondents of her plans to take extended trips abroad. Before purportedly leaving on her
(continued..)

Moreover, neither the pendency of respondents' motion to dismiss, nor the Court's strongly-worded February 17, 1998 Order denying Bragg's repetitive request for still more time, have prompted any further word from Bragg.⁵⁷ Bragg's whereabouts remain uncertain

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latest unannounced trip sometime after the October 28, 1997 prehearing conference, Bragg was on notice that discovery requests would be filed by respondents on or before November 17, 1997. See Notice and Order. Respondents timely served their requests on November 14, 1997, which arrived at Bragg's address of record on November 17, 1997. See attachment to Respondents' Motion Requesting Dismissal.

Presumably, Bragg would favor the Court and respondents with her participation in this matter if only it were more convenient to her extensive world-wide travels. But "[i]f [complainant] is unwilling or unable to fulfill her obligations to this forum, she [should have sought] to voluntarily dismiss this proceeding...." Hall v. Diversified Trading Systems, Inc., [1994-1996 Transfer Binder] (CCH) ¶26,131 at 41,752 (CFTC July 7, 1994); see Radden, ¶26,281 at 42,425.

It is this Court that is "responsible for the fair and orderly conduct" of the proceeding. 17 C.F.R. §12.304; accord Administrative Procedure Act, 5 U.S.C. §556(c); see also Hall at 41,751-52; Jenne, ¶24,329 at 35,424. It cannot permit a party, such as Bragg, to co-opt its role and direct the proceeding to the prejudice of her adversaries.

⁵⁷ Nor is Bragg spared from the consequences of her nonfeasance by her pattern of purportedly "losing" papers properly served on her address of record, and by her ruse of making dilatory requests that the Court provide her with another copy. Dick, ¶22,934 at 31,739. Even assuming the veracity of her representations in this regard, Bragg cannot be permitted to parlay her negligence in losing papers into a bad faith tactic for delay. The Court notes that Bragg was on actual notice no later than December 30, 1997 that respondents had served her with discovery requests. See Respondents' Motion to Compel Responses to Discovery Requests Propounded on Complainant, dated December 26, 1998; Order Compelling Production of Discovery, dated December 31, 1997. After the Court issued its January 8, 1998 Notice informing Bragg that it was disregarding Cox's letter purporting to seek relief on her behalf, Bragg waited until January 21, 1998 (the deadline that the Court established for her to produce her discovery) before making her perfunctory "requests" for an extension of time and another copy of the
(continued..)

and mysterious, and -- as discussed below -- respondents remain without the discovery necessary to provide them with a fair opportunity to defend against Bragg's claims.

In an attempt to investigate Bragg's allegations, respondents filed a request for admissions, a deposition on interrogatories and a request for production of documents.⁵⁸ In their discovery requests, respondents seek information and documents relevant to establishing: (1) the precise nature of the representations made by respondents to Bragg,⁵⁹ (2) Bragg's financial experience and sophistication,⁶⁰ and knowledge of the risks of trading,⁶¹ and (3) the extent to which Bragg's trading

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respondents' discovery demands. Order Extending Discovery Deadline, at 2 n.5 ("Filed on the day that her discovery production was due, the 'request' most closely resembles a demand since it indicates complainant's unwillingness to produce the compelled discovery, in the absence of an extension."). See Dick, ¶22,934 at 31,739 ("[N]othing in the rules of procedure gives a party the right to assume that once he has filed a motion for relief from an ALJ's order, he may then act as if the request has been granted....") (internal quotation marks and citation omitted). In a similar fashion, Bragg waited until the eve of the Court's extended deadline for production to repeat her pro forma "requests." See Order Denying Complainant's Motion for Extension of Time, dated February 17, 1998. She has never initiated any contact with respondents or the Court that would demonstrate her good faith in seeking to comply with the Court's discovery orders, or to cure her present breach.

⁵⁸ See Request for Admissions; Deposition on Interrogatories; Request for Production.

⁵⁹ See Request for Admissions, no. 6; Deposition on Interrogatories, no. 10; Request for Production, no. 1.

⁶⁰ See Request for Admissions, no. 3; Deposition on Interrogatories, nos. 1-9; Request for Production, no. 6.

⁶¹ See Request for Admissions, nos. 1, 2 and 8; Request for Production, nos. 4 and 5.

strategy was founded on the advice of persons or sources other than respondents.⁶² In so doing, respondents properly seek information and evidence uniquely within Bragg's possession that could be used to prepare for, impeach and/or rebut her testimony as to the nature of any representations made by respondents,⁶³ and to challenge Bragg's reliance on any representations made by respondents in opening and trading her accounts.⁶⁴ Without the ability to obtain such discovery, respondents' case is severely prejudiced.

Commission Rule 12.35 provides various consequences for parties that fail to comply with discovery orders. In particular, the Court may, upon motion by a party or on its own motion,

⁶² See Request for Admissions, nos. 4 and 5; Request for Production, nos. 2 and 3.

⁶³ See In re Staryk, [1994-1996 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶26,701 at 43,924 (CFTC June 5, 1996) ("In order to assess whether a representation is misleading, it is first necessary to determine the representation being made.").

⁶⁴ Reliance on, and proximate causation of injury arising from, respondents' misrepresentations are additional elements necessary to establish a fraud claim in reparations. See Steen v. Monex International, Ltd., [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶25,245 at 38,723 (CFTC Mar. 3, 1992); Muniz v. Lassila, [1990-1992 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶25,225 at 38,650 (CFTC Jan. 17, 1992); Sansom Refining Co. v. Drexel Burnham Lambert, Inc., [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶24,596 at 36,562 (CFTC Feb. 16, 1990); Theriac v. Parker, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶24,211 at 35,000 (CFTC Apr. 12, 1988); Schneider v. Rouse Woodstock, Inc., [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶23,196 at 32,514 (CFTC July 31, 1986); Jakobsen v. Merrill Lynch, Pierce, Fenner & Smith, Inc., [1984-1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶22,812 at 31,392 (CFTC Nov. 21, 1985); Vetrono v. Manqlapus, [1984-1986 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶22,702 at 30,984-85 (CFTC Aug. 6, 1985).

"take such action in regard thereto as is just, including but not limited to the following--

(a) Infer that the documents or things not produced would have been adverse to the party;

(b) Rule that for the purposes of the proceeding the information in or contents of the documents or things not produced be taken as established adversely to the party;

(c) Rule that the party may not be heard to object to introduction and use of secondary evidence to show what the withheld documents or other evidence would have shown;

(d) Rule that a pleading, or part of a pleading, or a motion or other submission by the party, to which the order for production related, be stricken;

(e) Dismiss the entire proceeding with prejudice to matters alleged in the complaint, but without prejudice to counterclaims; and

(f) Issue a default order and render a decision against the party, whose rights shall thereafter be determined by §§12.22 and 12.23 of these rules."

The first four sanctions are issue specific and are most appropriate where a party's discovery shortcomings are marginal. Here, however, the failure to produce discovery is wholesale, sweeping, and intentional. There is simply no just sanction available in this case other than dismissal. This is particularly true given that Bragg's credibility has suffered with each passing stage of the prehearing process.

Bragg's pleadings, coupled with her statements at the prehearing conference, are alternatively inconsistent, evasive or vague on several critical points. For example, in her pleadings,

Bragg acknowledges receiving the risk disclosure statements.⁶⁵ And when the subject was initially broached at the prehearing conference, she freely admitted that she signed the risk disclosure acknowledgment.⁶⁶ On follow-up questioning, however, she began to equivocate.

The Court: "So you did acknowledge receiving the CFTC required risk disclosure statements, is that correct?"

Bragg: "Well, if I did sign [the acknowledgment of receipt of the risk disclosure], but as I say, I don't recall seeing the six-page -- I do not recall seeing it. That's all I can say."

Tr. at 9.

Bragg suffered from an even more remarkable memory lapse in failing to recollect who recommended the initial investment in grains.

The Court: "Okay, I'm a little confused. How did the issue of grain futures come up? Did your friend, Ally McDaniel, recommend grains to you?"

Bragg: "She could have. Maybe [Price] put her in grains. I don't know. She -- I never knew exactly what she was doing with him, but she said it was a success. She could have -- she said that she wanted [Price] to do for me what he was doing for her, and maybe he had her in grains. I don't know."

⁶⁵ Response at ¶4 ("The claimant [sic] acknowledges receipt of the risk disclosure....").

⁶⁶ Tr. at 8.

The Court: "Is that your signature, Ms. Bragg?"

Bragg: "Yes, that's my signature...."

Id.

Tr. at 16-17.

The Court: "Did you or did you not suggest or raise the issue of trading in grain when you opened your first account with respondents? Mr. Gorrie says you did and Mr. Price says you did."

Bragg: "I don't recall that."

Tr. at 20-21.⁶⁷

Nor does Bragg clearly explicate any cognizable cause of action. When asked to more specifically describe any affirmative misrepresentations of risk made by respondents, Bragg could not.

The Court: "You understood futures and options trading to be a riskless type of transaction where you could only profit, is that what you're telling me?"

Bragg: "Well, that -- shall we say I -- this what the gist of what, when talking with Walter, he was very upbeat and it was -- people were making money and it was successful, and I didn't know the pitfalls of it and I didn't know they would chew-up \$35,000 in a very short time. No, I was never told that."

Tr. at 7.

The Court: "Price had certain strategies, he was optimistic about profit, is that -- was that a fair statement?"

⁶⁷ Compare,

The Court: "So you never discussed potential trades with Ms. McDaniel?"

Bragg: "No, no...."

Tr. at 27.

Bragg: "Yes. Yes, and [Tradeline is] supposed to be a very successful firm, very well known and my friend Ally McDaniel told me, and so therefore, I took her word of that and then when I talked to Walter Price, he sounded so upbeat and so alive and I was very impressed with the way he talked. Otherwise, I would have never handed over the first \$10,000."

Tr. at 15.

Without more, the "puffery," opinion and other soft and subjective claims that Bragg appears to be describing do not constitute actionable fraud.⁶⁸ In the absence of any objective misrepresentations by respondents in contradiction to the written risk disclosures, they cannot be held accountable for Bragg's

⁶⁸ Howard v. Haddad, 962 F.2d 328 (4th Cir. 1992) (Opinion by retired Associate Justice Powell, sitting by designation, finding that statements such as "the stock was a good investment" and "the stock was a good opportunity" are puffery and are not actionable under the securities laws); accord San Leandro Emergency Med. Plan v. Philip Morris, 75 F.3d 801, 811 (2nd Cir. 1996) (Statements such as Philip Morris is "optimistic" about its earnings" and Philip Morris "expected" Marlboro to perform well" are "puffery [which could not have] misled a reasonable investor" and are not actionable as fraudulent misrepresentation.); Raab v. General Physics Corp., 4 F.3d 286, 289-290 (4th Cir. 1993) (Statement such as "the DOE Service Group is poised to carry the growth and success of 1991 well into the future" is simply a "mere expression of optimism from company spokesmen" and is a statement which lacks materiality.); Indemnified Capital Investments S.A. v. R.J. O'Brien & Associates, Inc., 12 F.3d 1406, 1413 (7th Cir. 1993) ("[T]he representation of the O'Briens' 'highly successful trading ability,' made in the context of soliciting a customer, can be construed as nothing but an opinion and not a false statement of material fact. If actions for fraud could be successfully maintained every time someone optimistically represents his or her trading abilities, then our courts would be hopelessly deluged with fraud suits."); LaScola v. US Sprint Communications, 946 F.2d 559, 568 (7th Cir. 1991) (Statements such as: "the company has a lucrative compensation plan"; "the executives are 'straight shooters'"; and "US Sprint is ethical and committed to conducting business in accordance with the law" are not actionable as fraudulent misrepresentations.).

failure to appreciate that commodities trading can "chew-up \$35,000 in a very short time."⁶⁹ Moreover, the rendering of imperfect trading advice, standing alone, does not violate the Commodity Exchange Act.⁷⁰

Lastly, Bragg's allegations of unauthorized trading are especially troublesome. In her Response, Bragg states: "The claimant [sic] did not approve all the trades and investments completed by the respondents on her behalf."⁷¹ The Response, however, fails to specify any trades that respondents entered without Bragg's knowledge and consent. And Bragg has never alleged that she did not receive daily and monthly statements for her accounts, or ever claimed that she protested any trades until the filing of the Complaint (fifteen months after the accounts were open, and six months after the accounts were closed). Moreover, the Complaint omits entirely any claim of unauthorized

⁶⁹ Tr. at 7. See Staryk, ¶26,701 at 43,926 n.72, and authorities cited therein.

Bragg admits that she was aware that markets can move "down as well as up." Tr. at 26.

⁷⁰ O'Brien v. First Commodity Corporation of Boston, [1987-1990 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶24,402 at 35,768 (CFTC Feb. 8, 1989) (rejecting liability of respondent although "in hindsight, [respondent's] recommendation to hold the short position overnight was costly[.]"). See also Syndicate Systems, Inc. v. Merrill Lynch, Pierce, Fenner & Smith, Inc., [1986-1987 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶23,289 at 32,788 (CFTC Sept. 30, 1986) ("[T]he Commission will [not] question the wisdom of any recommendation of a commodity professional that proves unprofitable....Complainant has the burden of establishing that the challenged recommendation lacked a reasonable basis....And, this Commission does not generally sit to second-guess market prognoses or strategies....").

⁷¹ Response at ¶6.

trading. Finally, when asked, at the prehearing conference, as to whether respondents conferred with her before entering each and every trade, Bragg's response was evasive.⁷²

The Commission has emphasized the importance of the discovery process in developing the record in reparations proceedings.⁷³ If the Court were to opt to construe only a small part of the evidence not provided by Bragg against her, the Complaint fails for a lack of proof. In seeking to obtain such information as the precise nature of the statements made by respondent Price to Bragg,⁷⁴ and Bragg's notes memorializing them,⁷⁵ respondents seek to identify evidence material to the threshold issue of any fraud case, i.e., the nature of the representations made. Bragg's failure to provide this discovery, coupled the vagueness of her pleadings and her statements at the prehearing conference, supports a ruling that respondents made no actionable misrepresentations. Similarly, in seeking to obtain documents relating to Bragg's financial experience and acumen, including those relating to her futures and options experience,⁷⁶

⁷² See Tr. at 10-11.

⁷³ Motzek v. Monex International Ltd., [1992-1994 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶26,095 at 41,625 (CFTC June 1, 1994); Jenne, ¶24,329 at 35,424-25. Discovery may be particularly important in circumstances such as are present here: where the parties are pro se and the pleadings are "hardly [] model[s] of clarity." Hall, ¶26,131 at 41,751.

⁷⁴ Deposition on Interrogatories, no. 10.

⁷⁵ Request for Production, no. 1.

⁷⁶ Request for Production, nos. 4 and 5. At the prehearing conference, Bragg admitted to having prior experience trading silver options. Tr. at 21-22.

respondents seek evidence pivotal to the issue of her reliance on their representations,⁷⁷ as well as information useful in assessing Bragg's general credibility in portraying herself as an unwitting victim.⁷⁸ A finding in favor of respondents on these issues equally dooms Bragg's claim.

In short, Bragg's failure to provide the demanded discovery has fundamentally prejudiced the right of respondents to formulate counterarguments and present exculpatory evidence. This prejudice can only be cured by dismissal of the Complaint. Even if Bragg were to now faithfully comply with the Court's present and future orders (an assumption the Court does not make), it would not remedy the prejudice suffered by respondents as a consequence of delay,⁷⁹ or rectify the damage inflicted upon the integrity of the reparations program, as a whole.⁸⁰

⁷⁷ See Schreider, ¶23,196 at 32,514 ("[T]he sophistication and expertise of the complainant in financial, securities and commodity matters" is among the factors that should be considered in evaluating reliance.).

⁷⁸ See, e.g., Tr. at 10 ("[Price] called me at different times and talked so fast that half the time, I really didn't understand what he was talking about...."); Tr. at 33 (Well, [Price] was a very good salesman. He's very upbeat...."); Tr. 16 ("I know nothing about grains and I know nothing about currency.").

⁷⁹ As noted above, as early as the October 28, 1998 prehearing conference, Bragg professed to a failing memory of certain events. See Dick, ¶22,934 at 31,741 ("[D]elay is especially significant where as here, the complainants' case turns in part on recollections of oral conversations. For these reasons, therefore, we find the requisite prejudice through delay.").

⁸⁰ National Hockey League, 427 U.S. at 643.

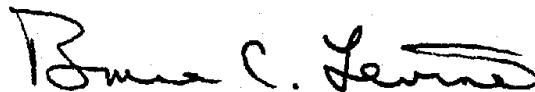
"[T]he most severe in the spectrum of sanctions provided by statute or rule must be available to the district court in appropriate cases, not merely to penalize
(continued..)

Order

For the reasons set forth above, the motion to dismiss filed by respondents Walter Frank Price, Tradeline Brokerage Services, LLC, and RB&H Financial Services, LP is hereby **GRANTED**. Pursuant to 17 C.F.R. §§12.35, 12.304(c), and 12.308(c), the Complaint is **DISMISSED** with **PREJUDICE**.

IT IS SO ORDERED.

On this 13th day of April, 1998



Bruce C. Levine
Administrative Law Judge

(..continued)

those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent."

Id.

Congress created the reparations program "to provide a speedy, just and inexpensive alternative for civil litigants." Dick, ¶22,934 at 31,741; See 41 Fed. Reg. 3993, 3994 (Jan. 27, 1976); S. Rep. 95-850, 95th Cong. 2d Sess. 11, 16 (1978). When parties, like Bragg, engage in cavalier conduct and employ dilatory tactics, they frustrate this purpose.

